

GENERAL OUTLINE FOR ISSUE SPOTTING – ASYLUM/WH/CAT

(Note—not all issues will arise in every case and may need to skip around)

ASYLUM & WH (under INA)

- I. One-year Bar for Asylum only (common issue at outset)
 - A. Two possible exceptions:
 - 1. Changed Circumstances (including changed ctry conditions or personal circ)
 - 2. Extraordinary Circumstances (see regs for examples)
- II. Credibility (can bar all 3 forms of relief if all based on same facts)
 - A. Post-REAL ID Act = “totality of the circumstances” standard
 - B. Pre-REAL ID Act = often requires discrepancies go to “heart of claim”
- III. Corroboration (can also bar all 3 forms of relief)
 - A. If not credible, lack of credibility can be rehabilitated by sufficient corroboration
 - B. Even if credible, however, corroborating evidence can be required (unless it cannot be reasonably obtained or there is a reasonable explanation for its absence)
 - 1. Note—Cir Cts are split re whether IJ must give notice and opportunity to obtain evidence (3d and 9th require notice/opp; 2d, 6th, and 7th do not/BIA does not)
 - 2. Note—pre-REAL ID Act has different corroboration requirements—often cannot ask for corroboration unless R found not cred
- IV. Past Persecution (R has BOP)
 - A. Level of harm must rise to level of persecution (check Cir Cts for examples)
 - 1. Use cumulative approach (if multiple incidents)
 - B. If PP established, presumption of WFF (BOP shifts to DHS to rebut)
 - 1. Asylum BOP = reasonable possibility of persecution or 10% chance
 - 2. WH BOP = clear probability or more likely than not or more than 50% chance
 - C. R must also show (2) nexus to (1) protected ground
 - 1. Protected grounds = race, religion, political opinion, nationality, MPSG
 - a) If MPSG alleged:
 - (1) Must be articulated before IJ
 - (2) Must be cognizable – 3 elements: immutability, particularity, social distinction (and cannot be circular)
 - b) R must also be member of PSG
 - 2. Nexus—was harm inflicted on account of the protected ground?
 - a) Post-REAL ID Act = protected ground must be “at least one central reason”
 - (1) BIA + most Cir Cts apply one central reason to WH too
 - (2) 9th Cir – only applies one central reason to asylum; protected ground need only be “a reason” for WH
 - b) Pre-REAL ID Act = allows “mixed motives” (a reason need not be “central”)
- V. R must also show persec is by gov or by private actors gov is unwilling or unable to control
 - A. Check Cir Ct law – some focus on:
 - 1. Gov complicity with private actors
 - 2. Widespread corruption/unwillingness to prosecute

- VI. R must also show persec is by gov or by private actors gov is unwilling or unable to control
 - A. Check Cir Ct law – some focus on:
 - 1. Gov complicity with private actors
 - 2. Widespread corruption/unwillingness to prosecute
- VII. If WFF established, BOP shifts to DHS to rebut by POE – 2 ways:
 - A. Fundamental change in circumstances
 - B. Internal relocation is reasonable (if non-state actor; if gov is persecutor, presumption that relocation is not reasonable)
 - 1. Must show R has ability to relocate (i.e., substantially better conditions exist elsewhere)
 - 2. And relocation is reasonable = totality of circ standard (see regs for examples)
 - 3. Persecution must be country-wide or fear is not WF
- VIII. If WFF is rebutted by DHS, and PP was established, R can still obtain “humanitarian asylum” if:
 - A. Compelling reasons exist arising out of the severity of the PP; or
 - B. Reasonable possibility of other serious harm exists (note—no nexus to harm required)
- IX. Even if no PP, R can obtain asylum/WH if shows:
 - A. “Well-founded” fear of persecution—two requirements:
 - 1. Subjective fear (i.e., R is credible about fear)
 - 2. Objective fear (reasonable person standard)
 - a) Asylum = reasonable possibility or at least 10% chance
 - b) WH = clear probability or more likely than not or more than 50% chance
 - B. Again, must have nexus to a protected ground—see section IV.C above
- X. Even if R establishes WFF or clear probability w/o PP, R must show:
 - A. Internal relocation not reasonable – R has BOP unless gov is persecutor; then DHS has BOP to disprove presumption of WFF by POE
 - B. If gov is not persecutor, persecution must be country-wide
- XI. Other ways to establish WFF (other than individual persecution)
 - A. Pattern or practice of persecution against group in which R is a member
 - B. “Disfavored group” analysis – only 9th Cir
- XII. Again, must show government is unwilling or unable to protect R from persecution by 3d person(s) – see section VI above
- XIII. Discretionary Denial of Asylum (WH is mandatory if R meets BOP)
 - A. IJ must reconsider a discretionary denial of asylum if grants WH, in order to take into consideration family reunification (i.e., only asylum allows for derivative asylum) (see regs)

CAT – WH & DEFERRAL (in regs, not INA)

- I. BOP = same as for WH under INA – clear probability or more likely than not will be tortured or $\geq 50\%$
 - A. 7th Cir has lower BOP = “substantial risk” of torture
 - B. Claim cannot be based on “string of suppositions”
- II. No need for a protected ground or nexus
- III. Requirements:
 - A. Past or future torture established as defined – see regs and case law
 - B. Must be by or with acquiescence of gov or gov is “willfully blind” to torture by 3d parties
- IV. Same bars to relief apply as for WH under INA, but R can still get deferral of removal

BARS TO RELIEF

I. Bars to Asylum:

- A. 1-yr bar (discussed above; 2 exceptions)
- B. Firm Resettlement – 4-step process under *Matter of A-G-G-*
- C. Safe Third Country Agreement (Canada)
- D. Frivolous Asylum Claims
 - 1. Notice required and
 - 2. Opportunity to explain
- E. Previously-filed Asylum Application
- F. Reinstated Removal Order

II. Bars to Asylum & WH (under INA and CAT):

- A. Persecutor Bar – limited duress exception – *see Matter of Negusie*
- B. Particularly Serious Crime (PSC) Bar
 - 1. For asylum, an aggfel is automatically a PSC and R barred
 - 2. For WH, if aggfel sentence ≥ 5 yrs, then PSC and barred
 - 3. For WH, if aggfel sentence < 5 yrs, then not automatically bar, but can still be a PSC based on nature of the crime
- C. Serious Non-Political Crime Bar
- D. Security Threat Bar
- E. Terrorist Bar
 - 1. 3 possible tiers of terrorist organizations
 - 2. Material Support – no duress exception
 - 3. Possible waiver granted by DHS, but IJ/BIA must use “but for” analysis first